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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/808,724	03/25/2004	Ian B. McPherson	7001-710A	5638
96695 7590 10/20/2010 Avaya Inc. and Withrow & Terranova 100 Regency Forest Drive Suite 160 Cary, NC 27518				
EXAMINER JAIN, RAJ K				
ART UNIT		PAPER NUMBER		
2472				
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10/20/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary**Application No.**

10/808,724

Applicant(s)

MCPHERSON ET AL.

Examiner

RAJ K. JAIN

Art Unit

2472

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 August 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 37-58 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 37-58 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 March 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) _____.
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

General Remarks

In view of the Appeal Brief Filed on August 9, 2010, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thornton*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

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be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 37-42, 43-48, 49-54, 55 and 56 is provisionally rejected on the ground of nonstatutory double patenting over claims 1-5, 6-10, 11-16 also 18-23 and 32 and 43 respectively against patented case 6,751,198.

This is a provisional double patenting rejection since the conflicting claims of the present applicant has not yet been patented. Both, the subject application and the patented case have claim languages that are phrased differently to claim the same subject matter, thus they are not patentably distinct from each other.

The subject matter claimed in the instant application is fully disclosed in the patented case referenced and would be covered by any patent granted on the instant application since the referenced patented case and the instant application are claiming common subject matter.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 37-58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Larson et al (USP 4,630,259) in view of Nitadori (USP 5,875,183).

Regarding claims 37, 43, 49, and 55 Larson discloses a network device (Figs. 1 & 5, a switching network with switching nodes) for use in a network transmitting packets the device comprising:

a timer (Fig. 5, ref. 531);

a processor (Fig. 1 ref. 149) operable for setting a transmit bit in an outgoing packet and starting the timer when the transmit bit is set (Fig. 5; col 5 lines 25-30; col 5 lines 50-57, a start bit in a packet indicates beginning of packet and to start the timer

531) and for reading a receive bit in a received packet and stopping the timer when the receive bit is read (Figs. 1 & 5; col 6 lines 22-25; stop bit in the received packet is read to stop the timer accordingly).

Larson fails to disclose the start/stop functions in a network and further monitoring a delay time of the network.

Nitadori discloses the start/stop functions in a network and further monitoring a delay time of the network (Figs. 1, 2A & 2B; col 9 lines 38-45; col 11 lines 9-11; col 13 lines 62-67; col 14 lines 5-14, lines 41-47; col 17 lines 35-41) network of Fig. 1 shows the transmission of packets from 14 to 18 and start of timer 44a and receiving an ACK from 18 stopping the timer and also measuring the delay times of the network by measuring deviation values from transceiver 14 to base station 18).

Monitoring timing delays between devices within a network and appropriately allocating of network resources minimizes network congestion at convergence points of the network and provides optimum communication amongst all subscribers.

Thus it would have been obvious at the time the invention was made to incorporate the teachings of Nitadori within Larson so as to enhance overall network performance by monitoring and allocating network resources based on usage and delay as appropriate.

Regarding claims 38, 44, and 50 Larson discloses an interface coupled to the processor, the interface operable for coupling the network device to the network and for transmitting the outgoing packet (Figs. 1 & 5 interface 115, 113, 132, 135 coupled to processor 149).

Regarding claim(s) 39, 45, 51 and 56, Larson discloses setting a another receive bit in another outgoing packet (Figs. 1 & 5; col 5 lines 25-30; col 5 lines 50-57, col 6 lines 22-25).

Regarding claims 40, 46, 51, 54 and 57, Larson discloses a transmitting means for a voice packet (col 2 lines 59-60, the patent 4,491,945 incorporated by reference illustrates utilizing packets with voice/data information communicated through the switching networks).

Regarding claims 41, 47, and 52, Larson discloses a round trip register operable for receiving a value from the timer (Fig. 6 ref. 600, col 6 lines 20-39).

Regarding claims 42, 48, 53 and 58, Larson fails to disclose comparing the value in the round trip data register to a predetermined value and sending an indication to a user when the value in the round trip data register is greater than the predetermined value.

Nitadori discloses comparing the value in the round trip data register to a predetermined value and sending an indication to a user when the value in the round trip data register is greater than the predetermined value (col 10 lines 36-54). Further Nitadori discloses voice packet transmission (Fig. 1, col 3 lines 1-5; claim 7).

End-to-end delay between devices of a network are measured to avoid collision and optimize network performance. Thus it would have been obvious at the time the invention was made to incorporate the teachings of Nitadori within Larson so as to properly monitor a network for congestion and/or delays and therefore optimize network performance.

Response to Arguments

Applicant's arguments, filed August 9, 2010, with respect to the rejection(s) of claim(s) 37-58 under **35 USC § 103** have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made Larson et al (USP 4,630,259) in view of Nitadori (USP 5,875,183).

With respect to **Double Patenting Rejection** of claim(s) 37-56, the Examiner acknowledges and accepts Applicants submission of a terminal disclaimer when this is the only rejection remaining on the record, however, Examiner will maintain the subject rejection on the records until submission of the terminal disclaimer as appropriate.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to RAJ K. JAIN whose telephone number is (571)272-3145. The examiner can normally be reached on M-TH.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, William Trost can be reached on 571-272-7872. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Raj K. Jain/

Primary Examiner, Art Unit 2472

/William Trost/

Supervisory Patent Examiner, Art Unit 2472